84-719

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in the

Supreme Court

of the

United States

OCTOBER TERM, 1984

MARK WAYNE and PHOEBE WAYNE, his wife,
Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY and
TUPELO CONCRETE PRODUCTS COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

THE FIFTH CIRCUIT COURT OF APPEALS USED THE WRONG STANDARD IN DETERMINING WHETHER TO APPLY A FEDERAL COMMON LAW STATUTE OF LIMITATION IN PETITIONERS' SUIT AGAINST THE TENNESSEE VALLEY AUTHORITY, A FEDERAL AGENCY AND INSTRUMENTALITY. PETITIONERS ALLEGE THE CORRECT STANDARD IS THE *CLEARFIELD TRUST CO. V. UNITED STATES* STANDARD BECAUSE IT DEALS WITH THE APPLICATION OF FEDERAL COMMON LAW WHEN THE FEDERAL GOVERNMENT IS A PARTY, WHEREAS THE *MIREE V. DEKALB COUNTY* STANDARD WHICH THE FIFTH CIRCUIT COURT OF APPEALS APPLIED IS APPLICABLE ONLY TO SUITS BETWEEN PRIVATE PARTIES WHERE THE FEDERAL GOVERNMENT IS NOT A PARTY.

II

THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT THE TENNESSEE PRODUCTS LIABILITY ACT OF 1978 IS SUBSTANTIVE LAW RATHER THAN PROCEDURAL LAW CONFLICTS WITH UNQUESTIONED ESTABLISHED CASE LAW IN THAT THE TENNESSEE PRODUCTS LIABILITY ACT DID NOT REPEAL ANY PREEXISTING COMMON LAW CAUSES OF ACTION FOR NEGLIGENCE, BREACH OF WARRANTY, OR STRICT LIABILITY IN TORT, NOR DID IT CREATE ANY NEW RIGHTS WHICH DID NOT EXIST AT COMMON LAW PRIOR TO ENACTMENT OF THE PRODUCT LIABILITY ACT.

III

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FINDING A RATIONAL RELATIONSHIP IN THE EXEMPTION OF ASBESTOS-RELATED CLAIMS, BUT THE NON-EXEMPTION OF RADIATION-RELATED CLAIMS, FROM THE TENNESSEE PRODUCT LIABILITY ACT'S ABSOLUTE 10 YEAR BAR FOR BRINGING PRODUCT LIABILITY ACTIONS.

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TENNESSEE VALLEY AUTHORITY and
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, MARK WAYNE and PHOEBE WAYNE, his wife, respectfully urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on April 12, 1984, rehearing denied May 25, 1984.

OPINION BELOW

This decision which Petitioners are seeking to be reviewed is reported as *Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir. 1984), a copy is appended hereto as App. 1-29.

JURISDICTION

The judgment sought to be reviewed is final and dated April 23, 1984. Petitioners' motion for an extension of time to file petition for rehearing was granted on May 4, 1984. Petitioners' petition for rehearing was denied on May 25, 1984. A copy is appended hereto as App. 39.

Jurisdiction for this Court to review by certiorari is conferred by 28 USC §1254.

Jurisdiction in the District Court over Respondent, Tennessee Valley Authority was pursuant to 28 USC §§1331 and 1337. Jurisdiction over Respondent, Tupelo Concrete Products Company was pursuant to 28 USC §1332.

Jurisdiction of the Fifth Circuit Court of Appeals was pursuant to 28 USC §1291.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

The Fifth Amendment of the United States Constitution reads in its pertinent part:

> "No person shall...be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment of the United States Constitution reads in pertinent part:

> "...No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

A copy of Tennessee Products Liability Act (TPLA) of 1978 (Tenn. Code Ann. §29-28-101 *et seq.*) is appended hereto as App. 40-46.

STATEMENT OF THE CASE

In 1968, Petitioners, Mark Wayne and his wife Phoebe Wayne, began construction of a home on their 247 acre cattle farm in Michie, Hardin County, Tennessee. To save money, they acted as their own general contractor. In October of 1978, the Waynes purchased concrete blocks filled with phosphate slag for use in the construction of their basement. The Waynes, not knowing of the radioactive nature of phosphate slag and the associated significant health risks for inhabitants of a house built with such blocks, purchased the blocks because of the light weight and associated ease in installing these concrete blocks.

The Waynes purchased the concrete blocks from W & W Builders of Counce, Tennessee, but the blocks were manufactured by Respondent, Tupelo Concrete Products Company (Tupelo) of Tupelo, Mississippi, using phosphate slag produced and sold as a by-product of Respondent, Tennessee Valley Authority's (TVA) Muscle Shoals, Alabama, fertilizer plant. For a time period of approximately 25 years (1953-1978), TVA promoted the use of radioactive phosphate slag as a filler for concrete blocks even though TVA knew the slag contained elevated levels of radiation (R81, Answer to Request for Admission #4; R294, ¶4). During this time period, TVA soid between 25,000 to 35,000 tons of radioactive phosphate slag to block manufacturers in Alabama, Florida, Georgia, Kentucky, Mississippi, and Tennessee (R154, 156-163).

In 1969, the Waynes and their two minor children moved into the completed house and lived there without any knowledge of any possible health hazard until January 24, 1979.

On December 18, 1978, the United States Environmental Protection Agency (USEPA) proposed the designation of phosphate slag as radioactive hazardous waste pursuant to the Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC §6901 *et seq.*) (See, 43 Fed. Reg. 59,015). This proposed regulation would have prohibited the use of phosphate slag in building materials in most circumstances.[1]

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[1]Congress subsequently directed the USEPA in 1980 to delay fully regulating phosphate slag under RCRA until six (6) months after a full study of phosphate slag is completed. 42 USC 6921(a)(3)(A). This study is still being conducted over four (4) years later.

In December, 1978, shortly after the USEPA's notice of the proposed designation of phosphate slag as radioactive hazardous waste was published in the Federal Register, TVA ceased all sales of phosphate slag to concrete block companies. (R295, ¶5).

From 1969 to January 24, 1979, the Waynes and their two minor children lived in their home built with radioactive concrete oblivious to any health hazard. On January 24, 1979, over eleven (11) years after the Waynes purchased their blocks, an article in a Memphis, Tennessee, newspaper alerted the Waynes to the fact that phosphate slag contains elevated levels of uranium and its various decay products, such as radon gas, which gives off hazardous radiation.[2]

The Waynes then contacted the Intergovernmental Phosphate Slag Task Force (the Task Force), an interagency task force composed of TVA, the USEPA, the State of Tennessee, and several states, which were conducting tests of the radon level in houses in the region where TVA sold its phosphate slag. The Task Force tested the Waynes' home and recorded radon levels higher than in any of the 29 other houses tested in a multi-state area. The Task Force recorded an average radon level in the Waynes' home of .048 working levels (WL). Average natural background levels are .004 WL, approximately 12 times lower than the level recorded in the Waynes' home.

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[2] Extended inhalation of radon causes lung cancer, leukemia and potentially all forms of cancer (R304). Inhalation of radon also can cause genetic injury. There is no safe threshold for exposure to radon. (48 Fed. Reg. 15,078, Subsection E).

According to USEPA risk estimates, a lifetime of exposure to .048 WL creates an additional lifetime risk of dying prematurely of cancer of between 3 to 7 in 100, plus an equivalent additional risk of approximately 3 to 7 in 100 of incurring a nonfatal cancer or genetic injury. (48 Fed. Reg. 15,083).

In September, 1979, the Waynes followed the advice of Tennessee Public Health Department and USEPA officials and moved out of their home. The value of the Waynes' home dropped from approximately $95,000 to virtually nothing.

Relying upon common law implied warranty, negligence, and strict liability in tort theories, the Waynes filed suit against Tupelo and TVA in federal court in the Northern District of Mississippi, Eastern Division. Jurisdiction over Tupelo was based on 28 USC §1332 (diversity of citizenship). Jurisdiction over TVA was based upon 28 USC §§1331 and 1337 (federal question and Act of Congress regulating commerce). The suit was filed 12 years and 3 months after the Waynes purchased their blocks and less than two (2) years after the Waynes first learned of the potential hazard by means of the newspaper report. The suit sought damages for personal injuries and for property damages. The Waynes' minor children were originally named as plaintiffs, but the childrens' claims were dismissed without prejudice since all parties agreed the children have until one (1) year after they reached majority to sue on their own behalf.

In December, 1982, the district court in a seven (7) page unpublished opinion granted Defendants' motions for summary judgment and dismissed Petitioners' claims as being barred by Tennessee's ten (10) year statute of limitations for all product liability actions except for asbestos-related claims.

The Petitioners appealed this judgment to the Fifth Circuit Court of Appeals. The Appellate Court affirmed the District Court's dismissal in a thirteen (13) page opinion reported as *Wayne v. Tennessee Valley Authority*, 730 F.2d 392 (5th Cir. 1984).

REASONS WHY WRIT OF CERTIORARI SHOULD BE ISSUED

Petitioners contend that a Writ of Certiorari should be issued in this case for the following reasons:

I

THE FIFTH CIRCUIT COURT OF APPEALS USED THE WRONG STANDARD IN DETERMINING WHETHER TO APPLY A FEDERAL COMMON LAW STATUTE OF LIMITATION IN PETITIONERS' SUIT AGAINST THE TENNESSEE VALLEY AUTHORITY, A FEDERAL AGENCY AND INSTRUMENTALITY. PETITIONERS ALLEGE THE CORRCT STANDARD IS THE *CLEARFIELD TRUST CO. V. UNITED STATES'* STANDARD BECAUSE IT DEALS WITH THE APPLICATION OF THE FEDERAL COMMON LAW WHEN THE FEDERAL GOVERNMENT IS A PARTY, WHEREAS THE *MIREE V. DEKALB COUNTY* STANDARD WHICH THE FIFTH CIRCUIT COURT OF APPEALS APPLIED IS APPLICABLE ONLY TO SUITS BETWEEN PRIVATE PARTIES WHERE THE FEDERAL GOVERNMENT IS NOT A PARTY.

In Part IV of the Fifth Circuit's opinion entitled "Formulation of Federal Common Law," the Court utilized the *Miree v. DeKalb County*, 433 U.S. 25, 53 L.Ed2nd 557, 97 S.Ct. 2490 (1977), standard as set forth in *First Southern Federal Savings & Loan Association v. First Southern Federal Savings & Loan Association*, 614 F.2d 71, 73 (5th Cir. 1980) as the guiding principle to determine whether to apply a federal common law statute of limitations in the instant case.

As the Second Circuit Court of Appeals held in the recent case of *In Re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 990-3 (2nd Cir. 1980), cert denied, 71 L.Ed2d 116 (1981), the *Miree* standard is the controlling principle for determining whether federal common law should be applied when the action "involves only private parties." Accord, *In Re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 737, 743-746 (E.D. NY 1979). The controlling principle on whether to apply federal common law in a case *where the federal government is a party* is the principle set forth in *Clearfield Trust Co. v. United States*, 318 U.S. 301, 305, 91 L.Ed2d 2067, 67 S.Ct. 1604 (1947). *In Re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 990-3 (2nd Cir. 1980).

In the instant case, the *Clearfield Trust* is the proper standard. TVA is a federal agency and instrumentality which was exercising the federal government's war and commerce powers when it operated the elemental phosphous plant plant which produced the radioactive phosphate slag in the concrete blocks in Petitioners' home. See, *Ashwander v. Tennessee Valley Authority*, 197 U.S. 288, 80 L.Ed2d 688, 700 (hn 10, 11) (fn 9) 1935.[3]

[3] See also, 28 USC §2671 which defines the term federal agency as including "corporations primarily acting as instrumentalities or agencies of the United States..."

Application of the *Clearfield Trust* principle to the instant case would result in a considerably different conclusion than that reached by the Fifth Circuit Court of Appeals using the *Miree* principle. The *Clearfield Trust* principle requires a federal court to apply federal common law:

> "1. When the question at bar is one arising from or bearing upon a federal program or affecting a federal interest
>
> 2. Where a federal interests would be subjected to uncertainty by application of disparate state rules; or
>
> 3. Where federal interests can best be effectuated by the adoption of a uniform federal rule."
>
> *"In re "Agent Orange" Products Liability Litigation,"* 506 F. Supp 737, 743 (E.D. NY 1979), aff'd on this point, 636 F.2d 987, 990-3 (2nd Cir. 1980)

The instant case clearly meets all three of these criteria. First, the question at bar directly arises from and has a bearing upon TVA, a federal program exercising the federal government's war and commerce powers, clearly a significant federal interest. See, *Ashwander v. Tennessee Valley Authority, Supra*. The federal government's extensive and significant interest in the proper handling, storage and disposal of radioactive waste is also affected and involved. The extensive and significant federal interest in the issue of TVA's radioactive phosphate slag in concrete blocks is also evidenced by the fact TVA has dispersed between 25,000 to 35,000 tons of radioactive phosphatic slag into concrete blocks in a six (6) state region, including Florida, Kentucky, Tennessee, Georgia, Alabama, and Mississippi, clearly a significant federal interest.

Second, this significant federal interest would clearly be subjected to uncertainty if disparate state statutes of limitations were applied to TVA. TVA's operations would be subjected to a time of discovery rule statute of limitations for personal injuries and property damage in Florida and Kentucky, an endless web of various statute of limitation rules in Mississippi depending upon the theory of the cause of action and whether the suit was for personal injuries or property damages, and an absolute ten (10) year bar for product liability suits in Georgia, Alabama and Tennessee.[4]

Third, the federal interests involved in this case can best be effectuated by a uniform federal common law statute of limitations for TVA. Such a uniform common law statute of limitations would provide uniformity and fairness[5] to TVA's operation. It would also assist the overriding federal interests of remedying the major public health hazard created by TVA's dispersal of 25,000 to 35,000 tons of radioactive phosphate slag over a six (6) state region.

Thus, this Court should exercise its Writ of Certiorari power on this issue because:

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[4] The Federal Torts Claims Act provides that all suits against the federal government shall be controlled by a two (2) year time of discovery statute of limitations. 28 USC §2401(b). Ths Fifth Circuit Court of Appeals ruled that TVA is not subjecdt to this provision because TVA is exempt from the Federal Torts Claims Act. TVA is exempt from the Federal Torts Claims Act because its federal charter provides that it can sue and be sued. 16 USC §831c(b). The waiver of sovereign immunity in the Federal Torts Claims Act was thus unnecessary in TVA's case.

[5] There is absolutely no justification for the Petitioners' claim being timely if they lived in Florida or Kentucky or Mississippi and untimely if they lived in Tennessee or Alabama or Georgia.

(1) of the conflict between the Fifth Circuit Court of Appeals' decision in this case and the Second Circuit Court of Appeals' decision in the case of *In Re "Agent Orange" Products Liability Litigatio*, 636 F.2d 987, 990-3 (2nd Cir. 1980); and

(2) Because an important question of federal law concerning the applicability of the *Clearfield Trust* and *Miree* principles, and the proper statute of limitations for TVA are involved and should be settled by this Court.

II

THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT THE TENNESSEE PRODUCTS LIABILITY ACT OF 1978 IS SUBSTANTIVE LAW RATHER THAN PROCEDURAL LAW CONFLICTS WITH UNQUESTIONED ESTABLISHED CASE LAW IN THAT THE TENNESSEE PRODUCTS LIABILITY ACT DID NOT REPEAL ANY PREEXISTING COMMON LAW CAUSES OF ACTION FOR NEGLIGENCE, BREACH OF WARRANTY, OR STRICT LIABILITY IN TORT, NOR DID IT CREATE ANY NEW RIGHTS WHICH DID NOT EXIST AT COMMON LAW PRIOR TO ENACTMENT OF THE PRODUCT LIABILITY ACT.

In Part V, B of the Fifth Circuit Court of Appeals' April 23, opinion, the Court held that Tennessee Products Liability Act of 1978 (TPLA) (Tenn. Code Ann. §29-28-101 *et seq.*) is substantive law because it is a "statute of repose" which does not rely upon the date of injury to compute the time limitation period and does not have tolling provisions. The

Court went on to state that the Tennessee Legislature repealed common law causes of action for negligence, breach of warranty and strict liability in tort when it enacted TPLA.

This holding by the Fifth Circuit Court of Appeals is contrary to well established law on several important points. First, the Tennessee Supreme Court considers **all** statutes of limitations to be statutes of repose. *Hackworth v. Ralston Purina Company*, 381 S.W.2d 292, 294 (hn 2) (Tenn. Supp. 1964). Thus, the term "statute of repose" is synonymous with the term statute of limitation and does not distinguish between whether a Tennessee statute of limitations is procedural or substantive law.

Second, in common law causes of action such as the Petitioners, a statute of limitation merely bars the **remedy,** it does not bar or extinguish the **right.** *Maki v. Cooke*, 124 F.2d 663 (hn 3) (6th Cir. 1942); 53 CJS, Limitations of Actions §30, second paragraph. Only when a statute gives a right of action **unknown to the common law,** and that statute establishes a time limitation for exercising the new right as a precondition to the exercise of the new right, is the time limitation substantive law. *Boyd v. Clark*, 8 F. 849, 852 (E.D. Mich 1981); *Maki v. Cooke, Supra*,; 53 CJS, Limitations of Actions §30.

In the instant case, the TPLA did not create a new cause of action nor did it repeal any common law causes of action. The TPLA is merely a procedural statute to define terms common to product liability actions (TCA §29-28-102), collect into one statute all the various statutes of limitations (TCA §29-28-103), place a maximum time limit on filing product liability actions (TCA §29-28-103) and provide a definition for the term defective or dangerous condition (TCA §29-28-105).

The TPLA did not repeal any common law causes of action. In fact, it specifically refers to recognized preexisting common law causes of action in TAC §§29-28-102(6), 29-28-103(a) and 29-28-106(a) and (b). A reading of the TPLA clearly establishes that it did not repeal any common law causes of action and did not create any new statutory causes of action. It merely provided procedural guidelines for utilizing preexisting common law causes of action. As such it is unquestionably procedural not substantive law and the TPLA does not apply. *Ibid.*

Thus, this Court should exercise its Writ of Certiorari power on this issue because:

(1) of the conflict between the Fifth Circuit Court of Appeals' decision in this case and the decisions of the Sixth Circuit Court of Appeals in *Maki v. Cooke, Supra*,; and

(2) the decision of the Fifth Circuit Court of Appeals so departed from the undisputed, established case law on this issue as to call for the exercise of this Court's supervisory power.

III

THE FIFTH CIRCUIT COURT OF APPEALS ERRED IN FINDING A RATIONAL RELATIONSHIP IN THE TENNESSEE LEGISLATURE'S EXEMPTION OF ASBESTOS-RELATED CLAIMS, BUT NON-EXEMPTION OF RADIATION-RELATED CLAIMS, FROM THE ABSOLUTE 10 YEAR BAR FROM BRINGING PRODUCT LIABILITY ACTIONS.

In Part VI, B the Fifth Circuit Court of Appeals' April 23 opinion, the Court held that there is a rational basis for the Tennessee Legislature exemption asbestos-related claims, but not radiation-related claims, from the absolute ten (10) year bar from bringing suit because asbestos is regulated as "a hazardous air pollutant with prescribed emission and disposal standards, see 40 C.F.R. §61.20-.22, while phosphate slag is expressly listed as a nonhazardous waste by the [USEPA], see 40 C.F.R. §261.4(b)(7)."

This holding is in error for several reasons. First, both asbestos and radionuclides are regulated as hazardous air pollutants under Section 7412 of the Clean Air Act (42 USC §7412). As to date, only four substances other than asbestos and radionuclides have been identified as hazardous air ollutants by the USEPA.

Second, both asbestos and phosphate slag are currently regulated by the USEPA as nonhazardous waste. The USEPA has identified phosphate slag as hazardous waste and is currently studying hazardous waste regulations for phosphate slag. The USEPA currently has no plans to identify, regulate or study asbestos as a hazardous waste. Thus the distinction the Fifth Circuit drew is invalid.

Third, both asbestos and airborne radionuclides are carcinogenic if exposure occurs over a long period of time. Both asbestos and airborne radionuclides have cancer latency periods in excess of ten (10) years. Individuals frequently purchase products causing exposure to asbestos and airborne radionuclides without knowing of the existence of the fact that they are being exposed to asbestos and airborne radiation. Both airborne radiation and asbestos health hazards are present in the State of Tennessee in significant numbers and both present a major public health hazard.

Clearly there is no rational basis for distinguishing between these two types of product liability claims. The present status of the TPLA irrationally discriminates against the class of persons exposed to products which cause significant airborne radiation health risks.

This Court should therefore exercise its Writ of Certiorari power on this issue because:

(1) The Fifth Circuit Court of Appeals has decided an important question of federal law which should be settled by this Court; and

(2) The decision of the Fifth Circuit so departed from the essential requirements of justice as to call for an exercise in this Court's power of supervision.

Respectfully submitted,

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REPORTED AT 730 F.2d 392

WAYNE v. TENNESSEE VALLEY AUTHORITY

Mark WAYNE, et al.,
Plaintiffs-Appellants,

v.

TENNESSEE VALLEY AUTHORITY, et al.,
Defendants-Appellees.

No. 83-1043

United States Court of Appeals,
Fifth Circuit.

April 23, 1984

Homeowners brought products liability and negligence action against producer of phosphate slag incorporated into concrete blocks used in construction of homeowners' home, manufacturer of blocks, and seller of blocks. The United States District Court for the Northern District of Mississippi, L. T. Senter, Jr., Chief Judge, entered summary judgment in favor of defendants, holding that homeowners' claims were barred by the Tennessee statute of limitations applicable to products liability actions. Homeowners appealed. The Court of appeals, Jerre S. Williams, Circuit Judge, held that: (1) producer of phosphate slag did not fraudulently withhold knowledge of hazardous radioactive nature of phosphate slag and slag-filled concrete blocks; (2) Tennessee statute of limitations relating to products liability actions applied; (3) Tennessee statute of limitations, as a statute of repose which imposes an absolute bar to actions brought more than ten years after allegedly defective product was purchased, barred homeowners' claims; and (4) Tennessee statute of limitations did not violate equal protection clause of the Fourteenth Amendment or due process rights of homeowners.

Affirmed.

1. Federal Civil Procedure - 2544

A party may not prevail on bare allegations of his complaint when there is a properly supported summary judgment motion made against him.

2. Fraud - 16

Where producer of phosphate slag used in manufacture of concrete blocks did not know or have reason to know of danger of radon gas in blocks in 1969, when blocks at issue were sold, and did not know or have reason to know of such a danger until near end of 1970's, when producer stopped sale of phosphate slag and told public why it was doing so, producer did not fraudulently withhold knowledge of hazardous radioactive nature of phosphate slag and slag-filled concrete blocks.

3. Federal Courts - 230

Claim against a wholly owned federal corporation created under an Act of Congress falls within general grant of federal question jurisdiction. 28 U.S.C.A. §1331.

4. Federal Courts - 423

Where no federal legislation or regulation directly addresses issue of proper limitation on suit against wholly owned federal corporation, state statute of limitations is ordinarily applied unless application of federal law is required to further a substantial and valid federal interest or policy.

5. Constitutional Law - 70.3(3)

Direction of national policy by enacting a rule displacing state law is generally, and purposely, reserved to legislative branch of government.

6. Federal Courts - 374

When Congress has legislated on subject, legislation, and not federal common law, will be deferred to.

7. Federal Courts - 374

Federal common law is developed when it must answer uniquely federal problems.

8. Federal Courts - 423

There was no significant conflict between federal policy and use of state statutes of limitations in suits against the Tennessee Valley Authority, a wholly-owned federal corporation, based upon products liability and negligence warranting establishment of federal common-law rule that suits against TVA were subject to limitations period of Federal Tort Claims Act. 28 U.S.C.A. § 2401(b)

9. Limitation of Actions - 2(3)

Where homeowners bringing products liability and negligence action against producer of phosphate slag incorporated into concrete blocks, manufacturer of blocks, and seller of blocks were Tennessee residents, blocks were purchased for and incorporated into Tennessee home, seller was a Tennessee company, and any injuries inflicted and damages sustained were based in Tennessee, Tennessee statute of limitations would be applied rather than statute of limitations of Mississippi, where blocks were manufactured. T.C.A. § 29-28-103 et seq.

10. Limitation of Actions - 55(4)

Tennessee statute of limitations applicable to products liability actions, as a statute of repose which imposes an ab–

solute bar to actions brought more than ten years after allegedly defective product was purchased, barred products liability and negligence suit against producer of phosphate slag incorporated into concrete blocks, manufacturer of blocks, and seller of blocks brought more than ten years after purchase of blocks even though injury did not occur within ten years of purchase. T.C.A. § 39-28-103 et seq.

11. Constitutional Law - 308
Limitation of Actions - 4(2)

Tennessee statute of limitations applicable to products liability actions did not, as a statute of repose which imposes an absolute bar to actions brought more than ten years after allegedly defective product was purchased, deny due process of law to homeowners bringing products liability and negligence action against producer of phosphate slag incorporated into concrete blocks, manufacturer of blocks, and seller of blocks more than ten years after purchase of blocks, despite alleged restriction of homeowners' access to courts. U.S.C.A. Const. Amends. 5, 14; T.C.A. § 29-28-103 et seq.

12. Constitutional Law - 249(3)
Limitation of Actions - 4(2)

Tennessee statute of limitations applicable to products liability actions, as a statute of repose which imposes an absolute bar to actions brought more than ten years after allegedly defective product was purchased, did not violate equal protection clause of the Fourteenth Amendment by excepting asbestos-related injuries from its scope, and thus allowing claimants alleging asbestos-related injuries a longer time to bring an action than claimants alleging radioactive phosphate slag-related injuries. U.S.C.A. Const. Amends. 5, 14; T.C.A. § 29-28-103 et seq.

Appeal from the United States District Court for the Northern District of Mississippi.

Before BROWN, GEE and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Plaintiffs appeal from a summary judgment entered in the Northern District of Mississippi holding that their claims are barred by the Tennessee statute of limitations applicable to product liability actions, Tenn. Code Ann. §§ 29-28-103 *et seq*. (1980) The Tennessee statute is a statute of repose which imposes an absolute bar to actions brought more than ten years after the allegedly defective product was purchased. Appellants seek to have a federal statute of limitations, 28 U.S.C. §2401(b), or a Mississippi statute of limitations, either Miss. Code Ann. § 15-1-49 or § 75 2-725, applied instead. Those statutes start the period of limitations running at the time the injury was, or should have been, discovered; under those statutes the Waynes' action would be timely.

1. FACTS

In 1968, Mark and Phoebe Wayne began construction of a house on their 247-acre cattle farm in Hardin County, Tennessee. To save money, they acted as their own general contractor. On the advice of their block mason, in October 1968, the Waynes purchased concrete blocks filled with phosphate slag to use in the construction of the basement. The Waynes purchased the blocks from W & W Builders of Counce, Tennessee, but the blocks were manufactured by appellee Tupelo Concrete Products Company of Tupelo, Mississippi, (Tupelo) using phosphate slag produced and sold as a by product of appellee Tennessee Valley Authority's (TVA) Muscle Shoals fertilizer plant.

In 1969, the Waynes and their two minor children moved nto the completed house and lived there without knowledge of any possible structural hazard until January 24, 1979. On that date an article in a Memphis, Tennessee, newspaper alerted them to the fact that phosphate slag contains uranium and its various decay products, such as radon gas, which give off potentially harmful radiation.[1] The Waynes then contacted the Intergovernmental Phosphate Slag Task Force (the Task Force), an inter-agency task force composed of TVA, the Environmental Protection Agency, the State of Tennessee, and several other states, which was conducting tests on houses in the area. The Waynes asked the Task Force to test monitor the radiation levels in their house. The Task Force tested their house and recorded an average radiation level higher than any of the twenty-nine other houses tested in a multi-state area. In September 1979, the Waynes followed the advice of Tennessee Public Health Department and United States Environmental Protection agency (EPA) officials and moved out of their house. The value of the Wayne's house dropped from approximately $95,000 to virtually nothing.

Relying on implied warranty, negligence, and strict liability theories, the Waynes filed suit against Tupelo and TVA in federal court in the Northern District of Mississippi, Eastern Division. The suit was filed in January 1981, over eleven years after the concrete blocks were purchased. The Waynes requested over fourteen million dollars in damages to compensate them for past, present, and future physical pain and suffering, mental anguish, medical expenses, and loss of the use and enjoyment of their house. The Wayne's minor children were originally named as plaintiffs, but at their own request their claims were dismissed without pre-

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1 Extended inhalation of radon gas is believed to cause lung cancer.

judice.[2] In December 1982, the district court granted defendants' motions for summary judgment and dismissed Mr. and Mrs. Wayne's claims as barred by Tennessee's ten year statute of repose for product liability actions. The Waynes appeal from that judgment.

II. MATERIAL ISSUES OF FACT

In their initial complaint the Waynes alleged that TVA fraudulently withheld knowledge of the hazardous radioactive nature of phosphate slag and slag-filled concrete blocks. Appellants now contend that there is no record evidence disproving that TVA withheld the critical information. As a result it is urged that whether TVA withheld information is a genuinely disputed issue of material fact making summary judgment improper. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970). Although TVA had the burden of proving there was no genuine issue, *see ibid.*, it met that burden as to fraudulent concealment of knowledge by submitting the affidavit of Ronald B. Maxwell, an employee of TVA's Office of Health and Safety who had been employed in the health physics area since 1965. The relevant portion of the affidavit reads as follows:

3. Early on the only potential hazard perceived by TVA and others in the health physics field from this type of material was direct radiation exposure. TVA conducted investigations from 1962 to 1965 on the amount of direct gamma external radiation from slag and found levels only slightly above natural background radiation. Based on those investigations direct radiation was not considered to be a significant hazard especially since concrete blocks contain only a small proportion of slag. At that time the state of the art

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[2] All parties agreed that the children have until one year after they reach majority to sue on their own behalf.

identified radon gas as a potential health concern in connection with phosphate and phospate by-product materials. Since there was no reason to suppose that there might be a health hazard from radon, no evaluation of the radiological implications of radon gas emitted by phosphate slag was performed

4. Not until the latter half of the 1970's was more knowledge gained about potential radon hazards from uranium mine studies and research. In February 1979 EPA released a report on the radon levels in structures built over phosphate mined areas in Florida (EPA 520/4-78-013).

. In reaction to draft versions of EPA's report, in December 1978, TVA no longer made slag available as a precautinary measure until further studies could be done.

In December 1978, TVA made public a news release stating that because phosphate slag was radiactive the sale of phosphate slag was being stopped until federal guidelines on the use of the slag were published. The news release indicated that the slag had been used by manufacturers of concrete blocks since the mid-1950's.

[1,2] Appellants submitted no evidence to counter the Maxwell affidavit. Rather, they relied solely on the unsupported allegations in their complaint. Even considering the affidavit in the light most favorable to the Waynes, it indicates that TVA did not know or have reason to know of the danger of radon gas in 1969, when the blocks at issue were sold, and did not know or have reason to know of such a danger until near the end of the 1970's, when TVA stopped the sale of phosphate slag and told the public why it was doing so.There was thus no genuine fact question raised as to whether TVA had fraudulently withheld knowledge of the dangers of phosphate slag. A party may not prevail on the bare allegations of his complaint when there is a properly

supported summary judgment motion made against him. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968). The district court acted properly in granting the summary judgment as to the issue of fraudulent concealment by TVA because no genuine material fact issue was presented.

III. FEDERAL STATUTE OF LIMITATIONS

A. *Review on Appeal of Matters Not Presented in the Trial Court.*

As to the claims against Tupelo and TVA based upon product liability and negligence, the district court granted summary judgment based upon the Tennessee ten year statute of repose. Appellants argue that the applicable statute of limitations in its acton against TVA is the federal statute set out in 28 U.S.C. § 2401(b), and not the Tennessee statute. Appellees contend that we should not address this issue because the application of federal limitations was not raised in the trial court. Whether the ten year Tennessee statute of repose was the proper statute was, however, squarely before the court since appellees asserted the Tennessee statute as an affirmative defense. Since appellees had the burden of asserting the proper statute and there was an issue as to the proper statute, the fact that appellants at trial claimed only the applicability of the Mississipi statute and not the federal statute does not control. The issue of what statute of limitations applies was properly raised and is before us. Because this case was decided in the trial court on the issue of the proper statute of limitations, it is proper to consider whether the federal limitations statute should be applicable.

U.S.C. § 2401(b) provides:

(b) A tort claim against the United States shall be

forever barred unless it is presented in writing to the appropriate Federal agency *within two years after such claim accrues* or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

(Emphasis added.)

Because TVA is a federally owned corporation which is an agency or instrumentality of the United States, *Painter v. Tennessee Valley Authority*, 476 F.2d 943, 944 (5th Cir. 1973), appellants contend that their action is a tort claim against the United States and that they had two years from the date their claim "accrued" to file suit. They rely on *Quinton v. United States*, 304 F.2d 234, 240, (5th Cir. 1962) to support the proposition that under the federal statute a claim does not accrue until it was, or should have been, discovered. Since we find, however, that § 2401(b) is not applicable to a suit against TVA, we need not decide when the Waynes' suit would have accrued under its provisions.

B. *Applicability of § 2401(b)*

In 1948, the Judicial Code of 1911 was revised. As part of that revision, 28 U.S.C. §§ 41(20) and 942(1940) were consolidated to create a new section, § 28 U.S.C. §2401. Thus the two year statute of limitations contained in § 420 of the Federal Tort Claims Act (FTCA), 60 Stat. 842 *et seq.* (1946), was removed from its place in the codification of that act, 28 U.S.C. § 942, to the new and separate § 2401.

Appellants argue that when the revisers moved § 942 from the context of the Federal Tort Claims Act and incorporated it into § 2401(b), they intended that thereafter it would

apply generally to *all* tort claims against the United States, including those against TVA. The assertion must fail, however. The original limitations section of the FTCA, § 420, was immediately followed by § 421 exempting the TVA entirely from the FTCA. Removing the limitations section to § 2401 did not change the law. The revisers stated: [s]ubsection (b) of the revised section simplifies and relates said section 942...*without change of substance*." (Emphasis added.) We note that the Court of Appeals of the Sixth Circuit has reached the same conclusion in *Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1051 (6th Cir. 1983). Because the revision was not intended to change the law it is clear that § 2401(b) was not intended to create a new statute of limitations for TVA. We must therefore look to another source for the applicable statute of limitations.

IV. FORMULATION OF FEDERAL COMMON LAW

A. *Federal Question Jurisdiction.*

[3] Appellants point out that the district court's jurisdiction over this action against TVA was not based upon 28 U.S.C. § 1332 (diversity of citizenship), as was the case against Tupelo, but upon 28 U.S.C. §§ 1331[3] and

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3 28 U.S.C. § 1331(a) provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

1337[4] (federal question, and actions arising under an Act of Congress regulating commerce). Appellants therefore argue that this Court is not bound to apply state limitations law. While it is true that a claim against a wholly-owned federal corporation created under an Act of Congress, such as TVA, falls within the general grant of federal question jurisdiction found in § 1331, *Jackson v. Tennessee Valley Authority*, 462 F. Supp. 45, 50 (M.D. Tenn.1978), *aff'd*, 595 F.2d 1120 (6th Cir. 1979), that does not of itself settle the choice of law question. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938) and its progeny require:

> (1) that federal law apply in areas of exclusive federal competence, (2) that state law apply in areas of exclusive state competence, and (3) that state law apply in areas of concurrent federal-state competence unless (a) federal legislation or regulation directly addresses the precise and narrow issue of dispute or (b) the application of federal law is required to protect or to effectuate a valid and substantial federal interest or policy. When, as in this case, extensive federal legislation and regulation exist in the area but do not directly address the precise and narrow issue of litigation, the pertinent analysis assesses whether there exists a valid and substantial federal interest or policy that requires the application of federal law as an exercise of interstitial lawmaking to protect or to effectuate the federal scheme. When no such federal interest or policy exists, *Erie* requires that state law apply.

First Southern Federal Savings & Loan Association v. First Southern Savings & Loan Association, 614 F.2d 71, 73 (5th Cir.1980)

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[4] 28 U.S.C. § 1337 provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

It has long been established that TVA has the capability of suing and being sued in its own name. *See* 16 U.S.C. § 831c(b). The Act which created the TVA, however, did not create an entire new body of procedural law regulating suits against TVA. Rather the applicable procedural rules and statutes of limitations have been determined by the nature of the cause of action alleged, not the fact that TVA was the defendant in the case. *See, e.g., Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1056 (6th Cir.1983) (claim against TVA based on Veterans Preference Act governed by laches since Congress had specified there would be no statute of limitations in the most analagous federal cause of action); *Ray v. Tennessee Valley Authority*, 677 F.2d 818, 822 (11th Cir.1982) *cert. denied*, — U.S. —, 103 S.Ct. 788, 74 L.Ed.2d 994 (1983) (claim against TVA based on Veterans Preference Act governed by analogous state statute of limitations for injuries to the person or rights of another arising from contract); *Harris v. Tennessee Valley Authority*, 507 F.Supp. 318, 320 (E.D.Tenn.1980) (action against TVA for failure to inform new employee of results of physical examination governed by Tennessee statute of limitations, Tenn. Code Ann. § 28-304.)

[4] Even if an action against TVA was an area of exclusive federal competence, it is evident as discussed above that there is no federal statute of limitations uniformly applicable to such a suit. The involvement of TVA arguably takes such a suit out of the area of exclusive state competence, so that this action involving a federally owned corporation and claims of negligence and product liability falls into an area of concurrent federal-state competence. Since no federal legislation or regulation directly addresses the issue of the proper limitation on suits, a state statute of limitations is ordinarily applied unless the application of federal law is required

to further a substantial and valid federal interest or policy. *First Southern Federal Savings & Loan Association*, 614 F.2d at 73.

B. *Federal Common Law.*

Appellants contend that there are over-riding federal interests in promoting the safe handling and disposal of radioactive hazardous waste, and dealing uniformly with the "thousands of citizens who unknowingly have purchased radioactive health hazards." They therefore suggest, as an alternative in the event that this Court determines that § 2401 is not now applicable, that this Court should fashion a federal common law rule of decision declaring that suits against the TVA are subject to the provisions and limitations of § 2401.

[5,6] Federal rules of common law are seldom fashioned since federal courts are not common-law courts which possess a general power to develop and refine their own rules of decision. Rather, the direction of national policy by enacting a rule displacing state law is generally, and purposely, reserved to the legislative branch of the government. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 312-13, 101 S.Ct. 1783, 1789-90, 68 L.Ed2d 114 (1981); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 195, 98 S.Ct. 2279, 2302, 57 L.Ed.2d 117 (1978). When Congress has legislated on the subject, the legislation, and not federal common law, will be deferred to. *City of Milwaukee*, 451 U.S. at 316, 101 S.Ct. at 1792. That Congress could readily enact a complete code governing the subject matter is by no means enough to justify a federal court fashioning a common law rule. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966). As the Supreme Court stated, "[i]n deciding whether rules

of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law...must first be specifically shown." *Ibid.*

[7] Federal common law is developed when it must answer uniquely federal problems. *Carlson v. Green*, 446 U.S. 14, 24, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (uniform federal rule of survivorship in *Bivens* actions); *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972) (federal rule to abate pollution of interstate waters); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943) (federal rule governing commercial paper issued by the United States). Appellants argue that the regulation of radioactive phosphate slag is a uniquely federal problem, and that the area is ripe for the development of federal common law. We note that there is a fundamental difference between determining, for example, allowable levels of radioactive emissions and determining allowable time periods within which suit may be brought. Even Congress has historically been reluctant to provide federal statutes of limitations for causes of action it has itself created. *Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1053 (6th Cir.1983). In the cases mentioned above the Supreme Court found the need to create a narrow substantive common law. They did not create federal common law limitations periods.

Federal regulation may well be the only effective way to prevent the pollution of one state's environment by another state's interstate shipment or sale of radioactive materials. *Cf. Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). Congress is obviously aware of the situation, however, for in a 1980 amendment to the Resource Conservation and Recovery Act it directed the EPA to delay regulating phosphate slag until six months after a study of the need for such regulation had been made.

42 U.S.C. § 6921(b)(3)(A). Such a study is currently underway. In the absence of comprehensive federal regulation of the use of phosphate slag, however, there is no uniquely federal need to regulate the *time* for enforcing rights which are currently governed by state law.[5]

Appellants argue that there is also a compelling federal interest in establishing a uniform time in which actions may be commenced against TVA, "an action which would be consistent with the clear Congressional intent to have all federal agencies subject to one uniform statute of limitations." Unfortunately for appellants, it is clear that Congress does *not* intend all federal agencies to be subject to one uniform statute of limitations. If it did, it would not have excluded the TVA from the reach of 28 U.S.C. § 2401. *See* section III B., *supra*.

[8] Because we do not find any significant conflict between federal policy and the use of state statutes of limitations in suits on this issue against the TVA, and because we find it would be contrary to Congressional intent, we decline to establish a federal common law rule that suits against TVA are subject to the provisions and limitations of 28 U.S.C. § 2401.

V. CHOICE OF LAWS

A. *Which State Limitations Statute?*

Having concluded that there is no federal statute of

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5 We do not mean to imply that, if there were comprehensive federal standards, we would find such a need.

limitations or federal unwritten limitations period applicable to this action against TVA, we next consider what state law is applicable. Appellants concede that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Klaxon Co. v Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.CT. 1020, 85 L.Ed. 1477 (1941), require that in suits governed by state law a federal court apply the choice of law rules of the forum state. Since this suit was brought in Mississippi, we must look to its choice of law rules.

As the district court noted, since 1968, Mississippi has followed the principles summarized in the Restatement (Second) of Conflict of Laws (the Restatement). *Mitchell v. Craft*, 211 So.2d. 509 (Miss. 1968). In short the restatement provides:

> Ordinarily, the local law of the state where the injury occurred will determine the rights and liabilities of the parties, "*unless* with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied."

Mitchell at 516 (summarizing and quoting the Restatement). Other factors the court should consider include which state's law will best advance the forum's and other interested states' interests, which state law is the better rule of law, and which state's law will protect the justified expectations of the arties. *Id. passim.*

The district court did not discuss specifically every factor listed in *Mitchell* and appellants claim that this necessitates a reversal and remand of this case. The district court did, however, discuss in detail its reasoning in applying Tennessee law. It found in part that:

There is no doubt that the Tennessee contacts predominate in the present cause of action. Plaintiffs are Tennessee residents. The concrete blocks were purchased for and incorporated into their Hardin County, Tennessee, home. The particular blocks at issue were purchased through a Tennessee homebuilding supply business and delivered directly to plaintiffs' Tennessee homesite according to Mark Wayne. Plaintiffs lived continuously with the radioactive emissions for ten years and, therefore, any injuries inflicted and damages sustained were based in Tennessee. The only important non-Tennessee contacts are TVA's residence and production of the phosphate slag in Alabama and TCP's residence and manufacturing of the concrete blocks in Mississippi..."

...Though TCP's manufacturing of the blocks in Mississippi creates a substantial contact, the court has chosen to afford this contact less than its customary weight because there is no evidence that TCP altered in any manner the radioactive quality of the phosphate slag. In other words, the evidence in the record indicates that TVA's Alabama contact (manufacturing the slag) was certainly more significant than TCP's Mississippi contacts.

[9] After adding into the balance the additional factors listed in § 6 of the Restatement, we conclude that they would not in any way tilt the scales toward application of Mississippi law. Of the three interested states, Tennessee has the strongest interest in having its laws applied since it was the domicile of the injured parties and any injury occurred there. Although appellants argue that Mississippi's statute of limitations is clearly the better law in that it runs from the time of discovery of a cause of action, instead of from the time of purchase of a product later giving rise to a cause of action, there are sound reasons (noted in Section VI A *infra*) in favor

of each policy for determining when limitations begin to run. Neither one may be decisively declared the "better" law. Finally, it has not been shown that there was any justifiable expectation by any party to this action, let alone the Waynes, that Mississippi rather than Tennessee law would apply. We find that the district court's decision that Tennessee's substantive law should be applied was correct in light of the predominance of Tennessee's contacts with, and interests in, this action.

B. *Substantive Nature of Tennessee's Statute of Limitations.*

The district court concluded that the statute of limitations set out in Tennessee's Products Liability Act of 1978 (TPLA), Tenn. Code Ann. § 29-28-101 *et seq.* (1980), is substantive rather than procedural, and applied it to bar the appellants' cause of action.

> As the district court observed:
>
> Statutes of limitation, though they can have a material effect on the outcome of a case, are usually characterized as procedural. Accordingly, the forum's own statute of limitation is usually applied even though the choice of law analysis dictates that a foreign jurisdiction's substantive law be applied. However, Mississippi recognizes a widespread exception that treats the foreign statute of limitation as substantive if it terminates the very cause of action itself. *See Davis v. Mills*, 194 U.S. 451 [24 S.Ct. 692, 48 L.Ed. 1067] (1904) ("barring the right, not merely the remedy"). Cases in which this exception has been applied include Ramsey v. Boeing Co., 432 F.2d 592 (5th Cir.1970), and *Cummings v. Cowan,)* 390 F. Supp. 1251 (N.D.Miss. 1975). When

deciding whether a foreign limitations statute is indeed "substantive" and, therefore, an exception to the general rule, the Mississippi court is bound by the constructions placed on the foreign statute of limitation by the courts of that jurisdiction.

Section 2 of the TPLA defines a product liability action as follows:

> "Product liability action" for purposes of this chapter shall include all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. It shall include, but not be limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or non-disclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever.

Tenn.Code Ann. § 29-28-102(6) (1980).

Section 3(a) of the TPLA further provides:

> Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions *it must be brought within six (6) years of the date of injury, in any event, the action must*

> *be brought within ten (10) years from the date on which the product was first purchased for use or consumption*, or within (1) year...after attaining the age of majority, whichever occurs sooner.
>
> Tenn. Code Ann. §29-28-103(a) (1980).

Tennessee's statute obviously terminates the very cause of action a maximum of ten years from the time of purchase or one year after the plaintiff attains the age of majority.[6] In *Buckner v. GAF Corp.*, 495 F.Supp. 351, 355 (E.D.Tenn.1979), *aff'd*, 659 F.2d 1080 (6th Cir.1981), the court explained:

> TCA § 23-3703 is not a conventional statute of limitations. It imposes an outer limit or ceiling upon the existing statute of limitations relating to actions for personal injuries, § 28-304. The "ceiling" imposed in § 23-3703 dates from "the date on which the product was first purchased for use or consumption." In construing similar statutes of limitations, the Tennessee Supreme Court has recognized that once the period of time provided by such ceiling has expired, actions brought after that period of time are *barred*. This is so even when the occurrence giving rise to the cause of action, or the injury happens, or is discovered, after the ceiling period.

(Citations omitted).

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[6] *See Tate v. Eli Lily & Co.*, 522 F. Supp. 1048, 1051 (M.D. Tenn. 1981) (construing the words "whichever occurs sooner" as a nullity).

In recent years many states have enacted such statutes.[7] They have been labeled "statutes of repose" in order to distinguish them from ordinary statutes of limitations which usually set much shorter time periods which run from the time the cause of action accrues, rather than from an arbitrary time such as the date of purchase. F. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM.U.L.Rev. 579, 584 (1981). Because the date of injury is not a factor used in computing the running of the time period, and such statutes typically do not have tolling provisions, the statutes acquire a substantive nature, barring rights of action even before injury has occurred if the injury occurs subsequent to the prescribed time period.

Appellants argue that a statute of limitations extinguishes a substantive right only when the right was created by a statute and was not known at common law. The theory upon which appellants rely is that the legislature which creates, for example, an action for wrongful death[8] may as a condition precedent to accrual of a cause of action require that suit be brought within the prescribed statutory period. Since the action was created by a statute which limited it, the time limit serves to bar not merely the remedy, but the right. If the right which is being sued upon was known at

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[7] In 1981 there were reported to be ninety-eight statutes in forty-eight states that could be considered statutes of repose. F. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am.U.L.Rev. 579, 580 (1981)

[8] There was no action for wrongful death at common law. *See Kozan v. Comstock*, 270 F.2d 839, 841 n. 5 (5th Cir.1959).

common law, however, it is argued that a statute of limitations may not take away, or bar, that right. All that it may do is prevent the plaintiff from recovering. Since tort actions for negligence, misrepresentation, and strict liability were known at common law, appellants urge that the TPLA cannot bar the appellants' right, but merely their remedy; and since a statute of limitations is substantive only if it bars the right itself, they urge that the TPLA limitation is procedural and should not be applied in this case.

Although appellants rely on cases such as *Davis v. Mills*, U.S. 451, 453, 24 S.Ct. 692, 693, 48 L.Ed. 1067 (1904); *Ramsay v. Boeing Co.*, 432 F.2d 592, 597 (5th Cir.1970); and *Kozan v. Comstock*, 270 F.2d 839, 841 (5th Cir.1959), as support for their argument, those cases do not state that statutes of limitations can bar only rights not known at common law. Rather, they discuss the effects of two different categories of statutes of limitations; those that apply to whole classes of actions, such as all tort actions; and those that apply to specific causes of action, and were created by the same statutes which created those causes of action.

[10] Appellants' convoluted reasoning is flawed in that it assumes that legislatures are precluded from altering or eliminating common law causes of action. Such is not the law. Legislatures can change common law rights just as they can create new rights. In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 89 n. 32, 98 S.Ct. 2620, 2638 n. 32, 57 L.Ed.2d 595 (1978) (citations omitted), the Supreme Court wrote:

> Our cases have clearly established that "[a] person has no property, no vested interest, in any rule of the

common law." The "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissable legislative object," despite the fact that "otherwise settled expectations" may be upset thereby. Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.

Because the requirements of the TPLA statute of repose must be met before a cause of action under the TPLA can be established, we affirm the district court's finding that the statutory requirement is substantive. It was properly applied in the Mississippi federal court as the controlling law. It bars appellants' suit. *See also Hines v. Tenneco Chemicals, Inc.*, 728 F.2d 729 (5th Cir. 1984) (North Carolina statute of repose treated as substantive in choice of laws context).

VI. CONSTITUTIONAL OBJECTIONS TO THE STATUTE OF REPOSE

The TPLA statute of limitations' absolute ten year bar is subject to several exceptions, one of which states that "the foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos." Tenn.Code Ann. § 29-28-103(b) (1980). Appellants argue that because the harms resulting from exposure to asbestos and phosphate slag are similar in nature, the TPLA violates the Equal Protection Clause of the Fourteenth Amendment by arbitrarily and capriciously distinguishing between asbestos-related claims and phospate slag-related claims. They contend that the right of access to the courts is a fundamental right so that a classification permitting some plaintiffs shorter time periods in which to sue must be justified by a compelling state interest.

Appellants thus mix together equal protection and due pro-

cess claims. The argument that a distinction between asbestos-related claims and phospate slag-related claims is not justified is clearly an equal protection claim because it turns upon the justifiability of a classification made by the state. The argument that a state may not curtail access to the courts without a compelling reason for doing so is a due process claim, because it turns upon the state's power to deprive tort claimants indiscriminately, after a certain period of time, of their alleged property interest in access to the courts.

A. *Due Process.*

If appellants' due process argument were valid, every filing fee and filing deadline, as well as every statute of limitations, would have to be justified by a compelling state interest since failure to comply with them would result in a restriction on a plaintiff's access to the courts. There is no absolute right of access to the courts. All that is required is a *reasonable* right of access to the courts—a reasonable opportunity to be heard. *Boddie v. Connecticut,* 401 U.S. 371, 378, 383, 91 S.Ct. 780, 786, 788, 28 L.Ed.2d 113 (1971).[9] When an Act has an economic purpose, limitations

[9] Before a "compelling interest" standard of strict scrutiny is applied, the right that plaintiffs seek to vindicate by access to the courts must be a fundamental right. Thus in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), the Supreme Court held that Connecticut's substantial interest in allocating scarce judicial resources was rationally related to its scheme of filing fees, but was not sufficient to override plaintiffs' fundamental interest in access to the only avenue permitted by state law for dissolving their marriage. *Id.* at 381, 91 S.Ct. at 788. In *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973), the Court observed that Kras' interest in

created by it must be upheld unless they are irrational and arbitrary. In *Duke Power Co.*, 438 U.S. at 84-85, 98 S.Ct. at 2636-37 (citations ommitted), the Supreme Court wrote:

> The liability-limitation provision thus emerges as a classic example of an economic regulation—a legislative effort to structure and accommodate "the burdens and benefits of economic life." "It is by now well established that [such] legislative Acts...come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." That the accomodation struck may have profound and far-reaching consequences, contrary to appellees' suggestion, provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.

The purpose of the TPLA is found in its preamble:

---

being discharged of his debts in a bankruptcy proceeding did "not rise to the same constitutional level" as one's interest in being able to dissolve one's marriage through the only legal avenue, the courts. *Id* at 446, 93 S.Ct. at 638. The Court therefore refused to require a compelling state interest as justification for the state's bankruptcy filing fee. In *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S.Ct. 1172, 1174, 35 L.Ed.2d 572 (1973), the Court noted that the interest in increased welfare benefits, like the interest in a bankruptcy discharge, "has far less constitutional significance than the interest of the *Boddie* appellants." Because the litigation was in the area of economics and social welfare, and no suspect classification was present, the standard applied by the Court was that of rational justificatin. *Id.* at 661, 93 S.Ct. at 1175.

WHEREAS...it is necessary to protect the public interest by enacting measures designed to make product liability insurance more readily available at a reasonable cost so that product cost may be lessened to the consumer; and

WHEREAS, In enacting this act, it is the purpose of the General Assembly to provide a reasonable time within which action may be commenced against manufacturers, and/or sellers while limiting the time to a specific period of time for which product liability insurance premiums can be reasonably and accurately calculated; and to provide other changes to expedite early evaluation and settlement of claims...

Tenn.Code Ann. § 29-28-103.

[11] Limiting the time within which actions may be brought has in numerous cases been held to be a rational, non-arbitrary means of achieving economic ends. *Sec. e.g., Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 141 (6th Cir.1983); *Buckner v. GAF Corp.*, 495 F.Supp. 351, 353 (E.D. Tenn. 1979), *aff'd.* 659 F.2d 1080 (6th Cir. 1981); *Harmon v. Angus R. Jessup Association*, 619 S.W.2d 522, 524 (Tenn.1981); *Harrison v. Schrader*, 569 S.W.2d 822, 827-28 (Tenn.1978). We therefore cannot find that the TPLA statute of repose denies appellants due process of law. *See also Mathis v. Eli Lilly and Co.*, 719 F.2d 134, 141 (6th Cir.1983) (applying an "arbitrary and capricious" standard and finding that the TPLA does not violate Due Process or "public policy").

B. *Equal Protection of the Laws.*

[12] In determining whether Tennessee violated the Equal Protection Clause of the Fourteenth Amendment by allowing claimants alleging asbestos-related injuries a longer time to

bring an action than claimants alleging phosphate slag-related injuries, we note, first, that people alleging phosphate slag-related injuries do not compose a suspect class. *See Frontiero v. Richardson*, 411 U.S. 677, 683, 93 S.Ct. 1764, 1768, 36 L.Ed.2d 583 (1973). Therefore the standard to be applied is whether the distinction between plaintiffs alleging asbestos-related injuries and phosphate slag-related injuries is rationally related to a legitimate government interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 2825, 37 L.Ed.2d 782 (1973). We find unconvincing appellants' argument that "there is absolutely no rational basis for exempting asbestos-related injuries from the ten year absolute bar for bringing a products liability claim and not exempting other long term continuing type injuries such as injuries resulting from exposure to low level radiation." The fact that asbestos is regulated as a hazardous air pollutant with prescribed emission and disposal standards, *see* 40 C.F.R. § 61.20-.22, while phosphate slag is expressly listed as a non-hazardous waste by the Environmental Protection Agency, *see* 40 C.F.R. § 261.4(b)(7), is one obvious justification for distinguishing between asbestos-related and phosphate slag-related claims.

The Court in *Hargraves v. Brackett Sripping Machine Co.*, 317 F.Supp. 676, 683 (E.D.Tenn.1970), neatly summarized the proper analysis to be applied in a case such as this.

> A statute of limitations must be judged in the light of the broad class of cases to which it applies and if it is reasonable with respect to the class, it will not be judged unreasonable merely because it is deemed to operate harshly in a particular or exceptional instance. In reaching this conclusion it should be emphasized that the role of the

> Court is not to pass upon the wisdom or lack of wisdom of the legislation involved. The courts do not sit to review the wisdom of legislation or regulation by public bodies, for these matters address themselves solely to the legislative or reglating body.

(Citations omitted).

The Court recognizes and regrets appellants' losses. But the very purpose of a statute of repose is to create a settled time when such losses can no longer be subject to claims. Ample authority establishes a governmental right to do this even though harsh results can occur under any such arbitrary time limit. Because we find that the Tennessee statute of limitations was properly selected as the applicable statute of limitations in this case, and because it does not violate appellants' Due Process and Equal Protection rights, the district court should be affirmed in all respects.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARK WAYNE, et al.,	)	
Plaintiffs,	)	
	)	**No.**
v.	)	**EC81-30-LS-P**
	)	
S. DAVID FREEMAN, et al.,	)	
Defendants	)	

MEMORANDUM OF OPINION

This diversity action comes before the court on motions for summary judgment filed by Defendants Tupelo Concrete Products Company (TCP) and Tennessee Valley Authority (TVA). Because this personal injury action concerns parties from three different states and acts taking place in three different states, the court's initial task is to resolve the choice of law issue.

Plaintiffs, Mark and Phoebe Wayne and their minor children, Cynthia and Amanda, are residents of Hardin County, Tennessee. Defendant TVA, an independent agency of the United States, is by statute a resident of Alabama. Defendant TCP is a Mississippi corporation with its principal place of business in Tupelo, Mississippi.

In 1969, after two years of construction, Plaintiff Mark Wayne moved his family into a new home he had built on the family farm in Hardin County, Tennessee. The basement and some other parts of the house were built of concrete

blocks filled with phosphate slag, a by-product of Defendant TVA's Muscle Shoals, Alabama, fertilizer program. For years TVA had sold this slag to area block manufacturers, including the manufacturer/supplier of plaintiffs' blocks, TCP. There is no evidence in the record that properties of the slag were altered in any manner by the block manufacturing process.

Plaintiff Mark Wayne selected the lightweight TCP slag-filled blocks on the recommendation of his mason. The blocks were purchased at W&W Home Builders of Counce, Tennessee, but Plaintiff Mark Wayne testified in his deposition that it was TCP that actually delivered the blocks to his Hardin County residence. TCP denies having made the delivery.

Plaintiffs lived in their new home for approximately ten years oblivious to any health hazard posed by the phospate slag until a January 24, 1979, article in a Memphis, Tennessee, newspaper, *The Commercial Appeal*, alerted them to the danger. *See* Phoebe Wayne deposition, exhibit one. According to the article, the phospate slag in the blocks contained uranium which emitted radioacive radon gas. Extended inhalation of the radon gas was believed to cause lung cancer. In September of 1979, after having their home tested for radioactive radon gas and radon daughters and on the advice of the Environmental Protection Agency and Tennessee Public Health Department officials, plaintiffs moved out of their home because of radiation hazard.

Plaintiffs filed the instant lawsuit on January 23, 1981. Relying on implied warranty, negligency, and strict liability theories, plaintiffs seek over fourteen million dollars in damages to compensate them for past, present, and future phys-

ical pain and suffering, mental anguish, medical expenses, and loss of the use and enjoyment of their home.

As a federal court deciding diversity matter, this court must apply Mississippi substantive law, *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). This includes the choice of law rules prevailing in this state, *Klaxon Co. v. Stentor Manufacturing Co.*, 313 U.S. 487 (1941). Since 1968, Mississippi has followed the principles summarized in the Restatement (Second) Conflict of Laws, applying the substantive law of the state which has the most substantial relationship to the parties, the occurrence, and the particular issue. *See Mitchell v. Craft*, 211 So.2d 509 (Miss. 1968).

Statutes of limitation, though they can have a material effect on the outcome of a case, are usually characterized as procedural. Accordingly, the forum's own statute of limitation is usually applied even though the choice of law analysis dictates that a foreign jurisdiction's substantive law be applied. However, Mississippi recognizes a widespread exception that treats the foreign statute of limitation as substantive if it terminates the very cause of action itself. *See Davis v. Mills*, 194 U.S. 451 (1904) ("barring the right, not merely the remedy"). Cases in which this exception has been applied include *Ramsey v. Boeing Co.*, 432 F.2d 592 (5th Cir. 1970), and *Cummings v. Cowan*, 390 F.Supp. 1251 (N.D. Miss. 1975). When deciding whether a foreign limitations statute is indeed "substantive" and, therefore, an exception to the general rule, the Mississippi court is bound by the constructions placed on the foreign statute of limitation by the courts of that jurisdiction.

In their motions for summary judgment, Defendants TVA and TCP contend that the ten-year Tennessee products

liability statute should be applied to completely bar the present cause of action. To support that result, defendants must establish not only that Tennessee is the state with the most significant relationship to the occurrence and the parties but also that the Tennessee statute not only bars the remedy but also extinguishes the legal right of action.

There is no doubt that the Tennessee contacts predominate in the present cause of action. Plaintiffs are Tennessee residents. The concrete blocks were purchased for and incorporated into their Hardin County, Tennessee, home. The particular blocks at issue were purchased through a Tennessee homebuilding supply business and delivered directly to plaintiffs' Tennessee homesite according to Mark Wayne. Plaintiffs lived continuously with the radioactive emissions for ten years and, therefore, any injuries inflicted and damages sustained were based in Tennessee. The only important non-Tennessee contacts are TVA's residence and production of the phosphate slag in Alabama and TCP's residence and manufacturing of the concrete blocks in Mississippi.

In support of their argument that the Tennessee statute of limitation is substantive, defendants rely on the wording of the Tennessee statute and call the court's attention to *Bucker v. GAF Corp.*, 495 F.Supp. 351 (E.D. Tenn. 1979), in which a Tennessee federal court, saying that "T.C.A. §23-3703 is not a conventional statute of limitations," barred a suit for asbestos exposure though plaintiff had not discovered his injury until after his action was statutorily barred.

In defense of defendants' motions, plaintiffs argue 1) that Mississippi has the most significant contacts, 2) that a federal statute of limitations should be fashioned, or 3) that

if the Tennessee statute is applied, the defendants' conduct tolled the statute either through fraud or as a continuous tort. All three of these arguments must be rejected.

The only Mississippi contacts are TCP's residence in Mississippi and its manufacturing the blocks in this state. (Plaintiffs correctly point out that TVA does business in Mississippi, but this business is not related to the present litigation and, hence, does not constitute a significant contact.) Under the Restatement (Second) Conflict of Laws torts analysis, the important factors to be considered are the place of the wrongful conduct, the place of the injury, the place of each party's residence, and the place where the relationship between the parties is centered. *See* Restatement (Second) Conflict of Laws §145. Each contact is to be evaluated according to its relative importance to the particular issue involved; however, the Second Restatement retains the basic preference for the law of the place of the injury unless the other factors demonstrate that a more significant relationship lies elsewhere. The Second Restatement's contracts approach incorporates the following factors as determinative: the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the residence or place of business of each contracting party. *See id.* at §188. When land is involved, the Second Restatement expresses a very strong preference for the law of the situs. *See, e.g., id.* at §208.

After comparing the facts of this case, *supra*, pp. 1-2, with the factors enumerated above, the court has reached the inescapable conclusion that Tennessee law must govern this action. Though TCP's manufacturing of the blocks in Mississippi creates a substantial contact, the court has chosen to afford this contact less than its customary weight because

there is no evidence that TCP altered in any manner the radioactive quality of the phosphate slag. In other words, the evidence in the record indicates that TVA's Alabama contact (manufacturing the slag) was certainly more significant than TCP's Mississippi contact.

The Court must also reject plaintiffs' attempt to invoke a federal "common law" statute or to cast defendants' conduct into a fraud or continuing tort framework. The cases plaintiffs cite in favor of federally-fashioned relief come from areas in which either federal regulation is comprehensive, the need for uniformity paramount, or federal common law commonplace. *See, e.g., Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* action); *Keicher v. Northwest Airlines, Inc*, 563 F.2d 1310 (9th Cir. 1977) (obligations of domestic air carriers); *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *affirmed* 421 U.S. 978 (1975) (air law regulation); *DeBardeleben Marine Corp. v. United States*, 451 F.2d 146 (5th Cir. 1971) (maritime law). Insofar as the continuing tort argument is involved, it is clear that defendants' acts were completed when the radioactive blocks were delivered to plaintiffs' homesite and defendants fully and finally relinquished all control over them. Finally, plaintiffs have neither pleaded fraud nor entered into a fiduciary relationship with the TVA which would obligate the TVA to disclose the slag's radioactivity.

Having chosen Tennessee law, the court is also of the opinion that the Tennessee statute of limitation should be applied as a substantive element of Tennessee's comprehensive products liability statute. As that statute forever bars any products liability action brought more than ten years from the date on which the product was first purchased for use or consumption, T.C.A. §29-28-103, Mark Wayne and Phoebe Wayne's claims for relief must be dismissed.

However, as all parties have agreed that Cynthia and Amanda Wayne's claims are preserved by the minors tolling provision incorporated into the statute, and as plaintiffs have asked that these claims be dismissed without prejudice to their being asserted at a later date, the minors' claims will be dismissed without prejudice. The court declines defendants' suggestion to assess attorney fees in connection with this dismissal without prejudice, as it appears that the great majority of the expense defendants have incurred to date has been in connection with the Mark and Phoebe Wayne claims, the premature nature of the minors' claims having been confessed by counsel for plaintiffs.

An appropriate judgment will be entered dismissing this action.

This 14th) day of December, 1982.

[Illegible]
UNITED STATES DISTRICT JUDGE

Formal Judgment of the Fifth Circuit Court of Appeals was entered on April 23, 1984. A copy of this Judgment was not provided to counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARK WAYNE, et al.,
Plaintiffs,

v.

S. DAVID FREEMAN, et al.,
Defendants,

No. EC81-30-LS-P

JUDGMENT

Pursuant to the Memorandum Opinion this day issued,

IT IS ORDERED:

That defendants' motions for summary judgment be and are hereby GRANTED;

That Plaintiff Mark Wayne and Phoebe Wayne's claims be and are hereby DISMISSED WITH PREJUDICE; and

That Plaintiff Cynthia Wayne and Amanda Wayne's claims be and are hereby DISMISSED WITHOUT PREJUDICE.

This 14th day of December, 1982.

[Illegible]
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 83 4043

MARK WAYNE, ET AL.,
Plaintiffs-Appellants

versus

TENNESSEE VALLEY AUTHORITY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

---

ON PETITION FOR REHEARING
(May 25, 1984)

Before BROWN, GEE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

[Illegible]
United States Circuit Judge

CHAPTER 28
PRODUCTS LIABILITY ACTIONS

SECTION.
29-28-101. Short title.
29-28-102. Definitions.
29-28-103. Limitation of actions-Exception.
29-28-104. Compliance with government standards — Rebuttable presumption.
29-28-105. Determiniation of defective or dangerous condition.
29-28-106. Seller's liability.
29-28-107. Complaint — Statement of damages.
29-28-108. Product altered or abnormally used.

29-28-101. Short title.—This chapter shall be known and may be cited as the "Tennessee Products Liability Act of 1978." [Acts 1978(Adj.S),ch.703.§ 1; T.C.A., § 23-3701.]

Law Reviews. Statutes of Limitations — Personal Injury, Property Damage and Breach of Warranty, 8 Mem. St. U.L.Rev.803.

The Tennessee Products Liability Act, 9 Mem. St. U.L. Rev. 105.

The Tennessee Products Liability Act of 1978 (Irvin L. Tankersley). 14-4 Tenn. B.J. 11.

Comparative Legislation. Products liability actions:

Ala. Code, tit. 6. §§ 6-5-500 — 6-5-525.

Ark. Stat. Ann. §§ 34-2801 — 34-2807.

Ky. Rev. Stat. Ann. §§ 411.300 ‡‡ 411.350.

N.C. Gen. Stat. §§ 99B-1 — 99B-10.

Va. Code § 8.2-318.

Cited: Commercial Truck & Trailer Sales, Inc. v. McCampbell, 580 S.W.2d 765 (Tenn. 1979).

Collateral References. 63 Am. Jur. 2d Products Liability §§ 1-4.

C.J.S. Supplement Products Liability §§ 1-6.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product-caused injury. 94 A.L.R.3d 1080.

29-28-102. Definitions. — As used in this chapter unless the context otherwise requires:

(1) "Anticipated life." The anticipated life of a product shall be determined by the expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption.

(2) "Defective condition" means a condition of a product that renders it unsafe for normal or anticipatable handling and consumption.

(3) "Employer" means any person exercising legal supervisory control or guidance of users or consumers of products.

(4) "Manufacturer" means the designer, fabricator, producer, compounder, processor or assembler of any product or its component parts.

(5) "Product" means any tangible object or goods produced.

(6) "Product liability action" for purposes of this chapter shall include all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacturer, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. It shall include, but not be limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever.

(7) "Seller" shall include a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such sale is for resale, or for use or consumption. Seller shall also include a lessor or bailor engaged in the business of leasing or bailment of a product.

(8) "Unreasonably dangerous" means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably

prudent manufacturer or seller assuming that he knew of its dangerous condition. [Acts 1978 (Adj.S.).ch.703. § 2;T.C.A., § 23-3702; modified.]

Section to Section References. This section is referred to in § 29-28-106.

Law Reviews. The Tennessee Products Liability Act, 9 Mem. St. U.L. Rev. 105.

The Tennessee Products Liability Act of 1978 (Irvin L. Tankersley), 14-4 Tenn. B.J. 11.

Cited: Commercial Truck & Trailer Sales, Inc. v. McCampbell, 580 S.W.2d 765 Tenn. 1979).

Collateral References. 63 Am. Jur. 2d. Products Liability §§ 221-223.

29-28-103. Limitation of actions — Exception. — (a) Any action against a manufacturer or seller of a product for injury to person or property caused by its defective or unreasonably dangerous condition must be brought within the period fixed by §§ 28-3-104, 28-3-105, 28-3-202 and 47-2-725, but notwithstanding any exceptions to these provisions it must be brought within six (6) years of the date of injury, in any event, the action must be brought within ten (10) years from the date on which the product was first purchased for use or consumption, or within one (1) year after the expiration of the anticipated life of the product, whichever is the shorter, except in the case of injury to minors whose action must be brought within a period of one (1) year after attaining the age of majority, whichever occurs sooner.

The foregoing limitation of actions shall not apply to any action resulting from exposure to asbestos. [Acts 1978(Adj.S.),ch. 703, § 3; 1979,ch. 162, § 1:T.C.A., § 23-3703.]

Law Reviews. The Tennessee Products Liability Act, 9 Mem. St. U.L. Rev. 105.

Cited: Commercial Truck & Trailer Sales, Inc. v. McCampbell, 580 S.W.2d 765 Tenn. 1979).

NOTES TO DECISIONS

1. Minors.

The Products Liability Act suggests that there is a general legislative policy not to include minors in the operation of restrictive statues of limitations and thus supports view that § 29-26-116 was not intended to suersaede the legal disability statute in the case of minors. Parlato v. Howe, 470 F. Supp. 996 (E.D. Tenn. 1979).

Collateral References. What statute of limitation governs actions based on strict liability in tort. 91 A.L.R.3d 455.
Limitation of actions 55(1), 95(2).

29-28-104. Compliance with government standards — Rebuttable presumption. — Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards. [Acts 1978(Adj.S), ch. 703, § 4; T.C.A., § 23-3704.]

Law Reviews. The Tennessee Products Liability Act. 9 Mem. St. U.L.Rev. 105
Collateral References. 77 C.J.S. Supplement Products Liability § 94.
Products liability 75-80.

29-28-105. Determination of defective or dangerous condition. — (a) A manufacturer or seller of a product shall not be liable for any injury to person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

(b) In making this determination the state of scientific and technological knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. Consideration is given also to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products.

(c) The provisions of this section do not apply to an action based on express warranty or misrepresentation regarding the chattel.

(d) A product is not unreasonably dangerous because of failure to adequately warn of a danger or hazard that is apparent to the ordinary user. [Acts 1978 (Adj. S.), ch. 703, §§ 5, 8; T.C.A, § 23-3705.]

Law Reviews. The Tennessee Products Liability Act. 9 Mem. St. U.L. Rev. 105.

NOTES TO DECISIONS

1. Unreasonably Dangerous Product.

If the product is determined to be unreasonably dangerous then failure of the plaintiff or his employer to heed instructions or warnings do not as a matter of proximate cause interrupt the defendants' liability unless the plaintiff voluntarily and unreasonably encountered and assumed a known danger. Young v. Reliance Elec. Co. 584 S.W. 2d 663 (Tenn. Ct.App.1979).

Collateral References. 63 Am. Jur. 2d Products Liability §§ 42-61.

77 C.J.S. Supplement Products Liability §§ 7-34.

Admissibility, against manufacturer, of product recall letter. 84 A.L.R.3d 1220.

Admissibility of evidence of subsequent repairs or other remedial measures in products liability cases. 74 A.L.R.3d 1001.

Duty of manufacturer to equip product with safety device to protect against patent or obvious danger. 95 A.L.R.3d 1066.

Modern cases determining whether product is defectively designed. 96 A.L.R.3d 22.

Products liability for defective vehicular gasoline tanks. 96 A.L.R.3d 265.

Promotional efforts directed toward prescribing physician as affecting prescription drug manufacturer's liability for product—caused injury. 94 A.L.R.3d 1080.

Product liability 8.

29-28-106. Seller's liability. — (a) No product liability action as defined in § 29-28-102(6), shall be commenced or maintained against any seller when the product is acquired and sold by the seller in a sealed container and or when the product is acquired and sold by the seller under circumstances in which the seller is afforded no reasonable opportunity to inspect the product in such a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition. The provisions of

this section shall not apply to actions based upon a breach of warranty, express or implied, as defined by § 47-2-101 et seq., or unless the manufacturer of the product or part in question shall not be subject to service of process in the state of Tennessee or service cannot be secured by the long-arm statutes of Tennessee or unless such manufacturer has been judicially declared insolvent.

(b) No product liability action as defined in § 29-28-102(6), when based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer unless said seller is also the manufacturer of said product or the manufacturer of the product or part in question shall not be subject to service of process in the state of Tennessee or service cannot be secured by the long-arm statutes of Tennessee or unless such manufacturer has been judicially declared insolvent. [Acts 1978(Adj.S.)ch 703, § 6; T.C.A., § 23-3706.]

Law Reviews. The Tennessee Products Liability Act, 9 Mem. St. U.L. Rev. 1-5.

Collateral References. Products liability 26.

29-28-107. Complaint — Statement of damages. — Any complaint filed in a products liability action shall state an amount of said suit sought to be recovered from any defendant. [Acts 1978 (Adj. S.), ch. 703, §7: T.C.A., §23-3707.]

Law Reviews. The Tennessee Products Liability Act, 9 Mem. St. U.L. Rev. 105.

Collateral References. 63 Am. Jur. 2d Products Liability §§ 206-227.

77 C.J.S. Supplement Products Liability §§ 35-48-69-96.

Products liability 73.

29-28-108. Product altered or abnormally used. — If a product is not unreasonably dangerous at the time it leaves the control of the manufacturer or seller but was made

unreasonably dangerous by subsequent unforeseeable alteration, change, improper maintenance or abnormal use, the manufacturer or seller is not liable. [Acts 1978(Adj.S.), ch. 703, § 9; T.C.A., § 23-3708.]

Law Reviews. The Tennessee Products Liability Act, 9 Mem. St. U.L. Rev. 105.

NOTES TO DECISIONS

1. Test of Foreseeability.

Failure to follow instructions or heed a warning is improperly characterized as an intervening cause, misuse or even abnormal use because the test of foreseeability attaching to those characterizations would necessarily frustrate those defenses. Young v. Reliance Elec. Co., 584 S.W.2d 663(Tenn.Ct.App.1979).

Collateral References. 77 C.J.S. Supplement Products Liability § 48.

Products liability 16.

Supreme Court, U.S.
FILED
DEC 5 1984
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-719

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARK WAYNE AND PHOEBE WAYNE, HIS WIFE,
Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY AND
TUPELO CONCRETE PRODUCTS COMPANY,
Respondents.

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, TUPELO CONCRETE PRODUCTS COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 84-719

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARK WAYNE AND PHOEBE WAYNE, HIS WIFE,
Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY AND
TUPELO CONCRETE PRODUCTS COMPANY,
Respondents.

ON WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, TUPELO CONCRETE PRODUCTS COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Mark Wayne and his wife Phoebe Wayne, constructed their home in 1968. They purchased concrete blocks in question in this lawsuit in October of 1968 [Petitioners' Statement of the Case erroneously states that the purchase occurred in 1978]. The original Complaint was filed in the United States District Court for the Northern District of

Mississippi on January 23, 1981, following publication of a newspaper article two years before in the Memphis, Tennessee, *Commercial Appeal*, which reported potential problems with "phosphate slag" used for manufacture of concrete blocks. (R. 252-253). No plaintiff has suffered any personal injury. (R. 254-255; 248).

At the trial level, Tupelo Concrete Products Company moved for summary judgment based upon the Tennessee Products Liability Act which contains a ten year statute of repose (10 Tenn. Code Ann. Section 29-28-103) and also upon the statute of limitations of the forum state, Mississippi, which provided a six year statute of limitations [Section 15-1-49. Miss. Code Ann. (1972)] and upon the further ground that plaintiffs admittedly had no claim for negligence. Thus, the remaining claims for breach of warranty and strict tort liability were barred under either Tennessee law or Mississippi law. The District Court and the Court of Appeals grounded the dismissal of this action on the Tennessee Products Liability Act of 1978 and its ten year statute of repose. (Pet. App. 1-36).

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE ISSUED

Respondent, Tupelo Concrete Products Company, contends that a Writ of Certiorari should not issue in this case for the following reasons:

I. The Court of Appeals for the Fifth Circuit used the proper standard in determining that no Federal common law statute of limitations should be fashioned in this action;

II. No Federal statute of limitations should be fashioned so as to apply to Tupelo Concrete Products Company, a private corporation where jurisdiction is based upon diversity of citizenship, 28 U.S.C. Section 1332;

III. The Tennessee Products Liability Act of 1978 is substantive and its ten year statute of repose was properly applied to bar the action in the court below;

IV. No Rule 17 reason exists for grant of the Writ of Certiorari.

ARGUMENT

I.

THE COURT OF APPEALS FOR THE FIFTH CIRCUIT USED THE PROPER STANDARD IN DETERMINING THAT NO FEDERAL COMMON LAW STATUTE OF LIMITATIONS SHOULD BE FASHIONED IN THIS ACTION

Petitioner complains that the Court of Appeals for the Fifth Circuit failed to apply the principles of *Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1947). Fashioning federal common law is reserved for responding to uniquely federal problems. *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972). There must be some significant conflict between application of federal policy or federal interest and state law. *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966); *Miree v. DeKalb County,* 433 U.S. 25, 53 L.Ed.2d 557, 97 S.Ct. 2490 (1977) announces the proper standard to be applied even in those cases which are considered "close".

Even in cases involving federal legislation, legislative intent to displace a contrary rule must be clear and unequivocal. *Texas Industries v. Radcliff Materials,* 451 U.S. 630, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981).

There is no significant federal interest affected by the issues at bar. As noted by the Court of Appeals, the Congress has deferred regulating phosphate slag pending a study of the need for such regulation which study is now in progress. 730 F.2d at 399.

The Court of Appeals further noted that the *time* for enforcing rights currently governed by state law does not present a unique federal requirement for regulation. 730 F.2d at 399. Indeed, it is rare for any federally fashioned rule of law to establish a limitation period not prescribed statutorily. None is cited by petitioner. It has only been in cases seeking enforcement of federally created rights that rules respecting limitations have been fashioned. *E.g. Ragan v. Merchants Transfer and Warehouse Co.*, 337 U.S. 530, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949); *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

Petitioners also argue that there is a conflict between the Court of Appeals' decision in the case at bar and that of the Court of Appeals for the Second Circuit in *In Re Agent Orange Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980). This respondent fails to see the conflict which requires resolution by this Court and in fact observes from a reading of *In Re Agent Orange* that federal common law rules were not fashioned since the application of state law posed no "threat to an 'identifiable' federal policy". 635 F.2d at 995. In fact, the Court of Appeals for the Second Circuit reversed the District Court determination to the contrary. It is the District Court's position which is actually advocated by petitioners. As in *Agent Orange*, the United States is not a party. Moreover, the United States has no apparent interest even in the outcome of this litigation. *Cf. Stevens v. Tennessee Valley Authority*, 712 F.2d 1047 (6th Cir. 1983).

II.

NO FEDERAL STATUTE OF LIMITATIONS SHOULD BE FASHIONED SO AS TO APPLY TO TUPELO CONCRETE PRODUCTS COMPANY, A PRIVATE CORPORATION WHERE JURISDICTION IS BASED UPON DIVERSITY OF CITIZENSHIP, 28 U.S.C. SECTION 1332

Jurisdiction as to the respondent, Tupelo Concrete Products Company is based upon diversity of citizenship, 28 U.S.C. Section 1332. *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) makes clear that there is no general federal common law. Certainly there is no compelling reason to fashion any federal common law as to any claim against Tupelo Concrete Products Company, a mere diversity defendant.

III.

THE TENNESSEE PRODUCTS LIABILITY ACT OF 1978 IS SUBSTANTIVE AND ITS TEN YEAR STATUTE OF REPOSE WAS PROPERLY APPLIED TO BAR THE ACTION IN THE COURT BELOW

Under the law of the forum state, Mississippi, Tennessee substantive law governs. *Mitchell v. Craft,* 211 So.2d 509 (Miss. 1968). No issue is raised on that point by petitioner. Mississippi treats a foreign statute of limitations as substantive if it terminates the very cause of action itself. *Cummings v. Cowan,* 390 F.Supp. 1251 (N.D. Miss. 1975); *Ramsay v. Boeing Co.,* 432 F.2d 592 (5th Cir. 1970). The right, not merely the remedy, is extinguished. *Davis v. Mills,* 194 U.S. 451 (1904).

The Tennessee statute of repose extinguishes the right, not merely the remedy, and is therefore substantive under Mississippi law. *Buckner v. GAF Corp.*, 495 F.Supp. 351 (E.D. Tenn. 1979).

The constitutionality of the Tennessee statute has been upheld not only on this appeal but also on prior considerations. *Harmon v. Angus R. Jessup Association,* 619 S.W.2d 522, 524 (Tenn. 1981); *Harrison v. Schrader,* 569 S.W.2d 822, 827-28 (Tenn. 1978); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 141 (6th Cir. 1983).

This Court has long adhered to the principle that the decisions of lower Courts as to matters of local law determination should be viewed with deference by the Supreme Court even where local law may be construed differently without such guidance. *Henderson Company v. Thompson,* 300 U.S. 258, 57 S.Ct. 447, 81 L.Ed. 632 (1937); *Chardon v. Fumero Soto,* ..... U.S. ....., 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983).

IV.

NO RULE 17 REASON EXISTS FOR GRANT OF THE WRIT OF CERTIORARI

Rule 17 of the Rules of the United States Supreme Court provides guidance respecting the Court's exercise of discretion in granting Writs of Certiorari. Although petitioners argue to the contrary, there is no Court of Appeals' decision in conflict with that of the Court below. Neither is the decision of the Court of Appeals for the Fifth Circuit in conflict with any state court of last resort. Moreover, there has been no departure from the accepted

and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

It is respectfully submitted that the application for Writ of Certiorari is frivolous and should be dismissed as meritless.

Respectfully submitted,

TUPELO CONCRETE PRODUCTS COMPANY,
RESPONDENT
By L. F. SAMS, JR., Its Attorney

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CERTIFICATE OF SERVICE

This is to certify that I, L. F. Sams, Jr., the attorney for the respondent, Tupelo Concrete Products Company, have this day delivered a true and correct copy of the above and foregoing Brief of Respondent, Tupelo Concrete Products Company, in Opposition to Petition for Writ of Certiorari to the persons listed below, by placing true and correct copies thereof in the United States Mail, proper postage prepaid addressed to them at the following addresses:

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DATED, this the 3rd day of December, 1984.

L. F. SAMS, JR.

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS.
CLERK

No. 84-719

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARK WAYNE, ET UX. PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-719

MARK WAYNE, ET UX., PETITIONERS

v.

TENNESSEE VALLEY AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE TENNESSEE VALLEY AUTHORITY IN OPPOSITION

Petitioners contend that the court of appeals should have applied a federal common law statute of limitations in this tort action, that the court of appeals misinterpreted the nature of the applicable Tennessee statute of repose, and that the Tennessee statute denies them equal protection.

1. In 1968, petitioners began building a house in Hardin County, Tennessee. To construct the basement walls, petitioners purchased concrete blocks manufactured in Mississippi by respondent Tupelo Concrete Products Company (Tupelo) (Pet. App. 5). The blocks were made from phosphate slag produced in Alabama by the Tennessee Valley Authority (TVA) as a byproduct of its fertilizer manufacturing operation (*ibid.*). Petitioners moved into the completed house in 1969. In early 1979, however, petitioners discovered that phosphate slag contains materials that may

give off dangerous radiation.[1] When tests later that year revealed a higher than normal radioactivity level in the house, petitioners moved out (Pet. App. 6).

In 1981, petitioners brought this tort action against TVA and Tupelo in the United States District Court for the Southern District of Mississippi. The district court dismissed the action. It ruled that substantive Tennessee law governed the suit, and pointed to the provision of the Tennessee Products Liability Act (Tennessee Act) (Tenn. Code Ann. § 29-28-103 (1980)) that bars any products liability action brought more than ten years after the plaintiff's purchase of a defective or dangerous product (Pet. App. 35).

The court of appeals affirmed (Pet. App. 1-29). It rejected petitioners' suggestion that it apply a federal common law statute of limitations instead of the Tennessee Act; the court noted that "[f]ederal common law is developed when it must answer uniquely federal problems" (Pet. App. 15) and that no compelling federal interests exist in this case (*id.* at 16). The Fifth Circuit also held that the 10-year bar in the Tennessee Act is a substantive "statute of repose" rather than a procedural statute of limitations, and as substantive law was properly applied in this case by the district court (Pet. App. 21-24).[2] Finally, the court of appeals concluded

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[1]In December 1978, TVA, in response to reports that phosphate slag might present health hazards, stopped making the slag available for home construction pending further study (Pet. App. 8). In 1980, Congress prohibited the Environmental Protection Agency (EPA) from regulating phosphate slag for a period of six months after it had completed a full study of the product. 42 U.S.C. 6921(b)(3)(A). EPA accordingly designated phosphate slag a nonhazardous waste pending completion of such a study. 40 C.F.R. 261.4(b)(7).

[2]The court of appeals noted that a statute of repose terminates the underlying cause of action and therefore is "substantive," while a statute of limitations affects the availability only of the remedy and therefore is procedural (Pet. App. 19-21).

that the Tennessee legislature acted rationally in creating exceptions to the Tennessee Act's ten-year limitation (Pet. App. 28).

2. In this Court, petitioners repeat the arguments rejected by the Fifth Circuit. They are without merit and do not warrant further review.

a. The court of appeals acted correctly in declining to create a federal common law statute of limitations to govern this action. This Court consistently has held — whether or not the federal government or one of its instrumentalities is a party to the litigation — that the question "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.' " *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979), quoting *United States* v. *Standard Oil Co.*, 332 U.S. 301, 310 (1947). See *Miree* v. *DeKalb County*, 433 U.S. 25, 29 (1977); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). State law may appropriately be applied when doing so will not "frustrate specific objectives of * * * federal programs," and when "there is little need for a nationally uniform body of law." *Kimbell Foods*, 440 U.S. at 728. Conversely, creation of a federal rule is in order when the case "raise[s] issues of uniquely federal concern." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 95 (1981).

Here, no such federal concerns exist. As the court of appeals noted, "[i]n the absence of comprehensive federal regulation of the use of phosphate slag" (see n. 1, *supra*), it is difficult to find a "uniquely federal need to regulate the *time* for enforcing rights" related to use of the slag (Pet. App. 16 (emphasis in original)). Indeed, TVA's substantive liability in actions such as this one is determined by reference to state

law (see, *e.g.*, *Jackson* v. *Tennessee Valley Authority*, 413 F. Supp. 1050, 1055 (1976), reinstated after remand, 462 F. Supp. 45 (M.D. Tenn. 1978), aff'd, 595 F.2d 1120 (6th Cir. 1979)); petitioners do not contend that the lower courts should have created special federal liability rules to govern this action. Yet if the nature of the federal interest in this case does not demand application of a uniform federal substantive rule, absent extraordinary circumstances it surely does not require application of a federal statute of limitations. Cf. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109-110 (1945).

Finally, petitioners plainly are incorrect when they argue (Pet. 10) that federal agencies and instrumentalities should in no event be required to face inconsistent state limitations rules. To the contrary, Congress explicitly has excluded TVA from the reach of 28 U.S.C. 2401, which creates a uniform limitations period for tort claims brought against most federal agencies. See 28 U.S.C. 2680(*l*); Pet. App. 10-11.

b. Petitioners also maintain that the Mississippi courts would view the ten-year bar in the Tennessee Act as a procedural rather than as a substantive rule, and therefore would apply Mississippi's own statute of limitations.[3] Petitioners base this argument on the twin propositions that Tennessee does not distinguish between statutes that eliminate a right and those that simply bar a remedy, and that, in any event, a statute of repose may be viewed as substantive only when it limits the exercise of a right that was unknown at common law.

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[3]Petitioners do not challenge the court of appeals' conclusion that, under Mississippi choice of law rules, Tennessee's substantive law should govern in this case (see Pet. App. 16-19).

Both of these propositions are baseless. As both courts below concluded (see Pet. App. 19-21, 33, 35), Tennessee does recognize a distinction between statutes that extinguish rights and those that bar remedi . See *Buckner* v. *GAF Corp.*, 495 F. Supp. 351, 355 (E.D. Tenn. 1979), aff'd, 659 F.2d 1080 (6th Cir. 1981). Those courts then correctly held that the Tennessee Act must be viewed as a statute of repose because it "obviously terminates the very cause of action ten years from the time of purchase" (Pet. App. 21). As for petitioners' second point, the court of appeals noted that it "is flawed in that it assumes that legislatures are precluded from altering or eliminating common law causes of action" (*id.* at 23). This plainly is not the law. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 58, 89 n.32 (1978). It thus appears that the Mississippi courts would reject the distinction drawn by petitioners. See generally *Ramsay* v. *Boeing Co.*, 432 F.2d 592, 596-598 (5th Cir. 1970).[4] In any event, further review of these state law issues is not warranted.

c. Finally, petitioners contend that the Tennessee Act denies them equal protection by creating an exception to its ten-year limit for asbestos-related injury claims (Tenn. Code Ann. § 29-28-103(b) (1980)) but not for claims involving phosphate slag. As the court of appeals noted, however (Pet. App. 28), asbestos is regulated as an air pollutant (40

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[4]Petitioners contend that the decision below is in conflict on this point with *Maki* v. *George R. Cook Co.*, 124 F.2d 663 (6th Cir. 1942). But *Maki* involved Michigan rather than Mississippi choice of law rules. In any event, the Sixth Circuit held only that a bar to the exercise of a statutorily-created right would be regarded as substantive; it did not hold that a bar to the exercise of a common law right would be regarded as procedural.

C.F.R. 61.20 to 61.22 (1981ed.)); in contrast, the Environmental Protection Agency has classified phosphate slag as a nonhazardous waste (40 C.F.R. 261.4(b)(7)). Of itself, this difference between the substances supports the distinction drawn by the Tennessee legislature. See *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 534 (1973).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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